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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 DONALD ARTHUR YAW and  
9 MARIETTA DIANNE YAW, Husband  
and Wife,

10 Plaintiffs,

v.

11 AIR & LIQUID SYSTEMS  
12 CORPORATION, et al.,

13 Defendants.

CASE NO. C18-5405 BHS

ORDER GRANTING PLAINTIFFS'  
UNOPPOSED MOTION TO  
AMEND AND RESERVING  
RULING AND REQUESTING  
SUPPLEMENTAL BRIEFING ON  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

14 This matter comes before the Court on Defendants General Electric Company  
15 ("GE"), CBS Corporation ("Westinghouse"), and Foster Wheeler Energy Corporation's  
16 ("Foster Wheeler") (collectively "Defendants") motion for summary judgment. Dkt. 95.  
17 The Court has considered the pleadings filed in support of and in opposition to the  
18 motion and the remainder of the file and hereby reserves ruling and requests  
19 supplemental briefing on the motions for the reasons stated herein.

20 **I. FACTUAL BACKGROUND**

21 Donald Arthur Yaw ("Mr. Yaw") worked at Puget Sound Naval Shipyard  
22 ("PSNS") in Bremerton, Washington from approximately 1964 to 2001. Dkt. 1, ¶ 28.B.

1 Mr. Yaw worked as an apprentice from 1964 to 1968, as a shipfitter from 1968 to 1980,  
2 and as a structural planner and estimator from 1980 to 2001. *Id.* Mr. Yaw was exposed to  
3 asbestos-containing products and products manufactured for foreseeable use with  
4 asbestos products during his work at PSNS. *Id.* ¶ 28. Mr. Yaw was diagnosed with  
5 mesothelioma on March 26, 2018, *id.* ¶ 28.F, and died on September 29, 2018, Dkt. 140  
6 at 2 (citing Dkt. 141-1 at 2).

## 7 **II. PROCEDURAL HISTORY**

8 On May 21, 2018, Plaintiffs Mr. Yaw and Marietta Dianne Yaw (“Mrs. Yaw”)   
9 filed a complaint against the Defendants named in this order as well as nineteen other  
10 entities for personal injuries Mr. Yaw sustained due to exposure to asbestos between  
11 1964 and 2001. Dkt. 1.<sup>1</sup> On January 31, 2019, Defendants filed a motion for summary  
12 judgment. Dkt. 95. On February 19, 2019, Plaintiffs responded. Dkt. 106. On February  
13 22, 2019, Defendants replied. Dkt. 111.

## 14 **III. MOTION TO AMEND COMPLAINT**

15 On March 21, 2019, Mrs. Yaw filed a motion for leave to amend her complaint to  
16 add a claim for wrongful death. Dkt. 140 at 3. While the deadline for amended pleadings  
17 in this case was October 4, 2018, Dkt. 87, Mr. Yaw passed away on September 29, 2018,  
18 just five days before the deadline, Dkt. 140 at 3. Mrs. Yaw explains that she attempted to  
19 negotiate a stipulation to amend the complaint but was unsuccessful, leading to the need  
20 for her motion. Dkt. 140 at 3. No defendant, whether named in this Order or otherwise,

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21 <sup>1</sup> Because Mr. Yaw has passed away since the filing of this lawsuit, the Court will refer to Mrs.  
22 Yaw as the primary Plaintiff.

1 filed opposition to the motion. “[W]hen a party seeks to amend a pleading after the  
2 pretrial scheduling order’s deadline for amending the pleadings has expired, the moving  
3 party must satisfy the ‘good cause’ standard of Federal Rule of Civil Procedure 16(b)(4),  
4 which provides that ‘[a] schedule may be modified only for good cause and with the  
5 judge’s consent,’ rather than the liberal standard of Federal Rule of Civil Procedure  
6 15(a).” *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir.  
7 2013). The Court finds that the timing of Mr. Yaw’s passing clearly constitutes good  
8 cause.

9         If the Court finds good cause for leave to amend under Rule 16(a), the Court next  
10 considers pursuant to Fed. R. Civ. P. 15 whether the amendment shows or would create  
11 “(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of  
12 amendment; and (5) whether plaintiff has previously amended his complaint.” *Allen v.*  
13 *City of Beverly Hills*, 911 F.3d 367, 373 (9th Cir 1990). As noted, no defendant has  
14 opposed the motion. Under the Local Rules, the Court may consider a failure to respond  
15 as an admission that the motion has merit. Local Rules W.D. Wash. LCR 7(b)(2). The  
16 Court finds no indication of bad faith, prejudice to the opposing party or futility of  
17 amendment, and Mrs. Yaw has not previously amended her complaint. While there was  
18 some delay before the filing of this motion on March 21, 2019, the Court finds no  
19 indication that it was undue. Therefore, the Court will grant the motion to amend.<sup>2</sup>

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22 <sup>2</sup> The Court cites to the original complaint in this Order as it is the version in force at the time of writing.

#### IV. SUMMARY JUDGMENT

Mrs. Yaw brings claims including products liability claims on both negligence and strict liability theories, claims for conspiracy and premises liability, claims under “the former RCW 49.16.030, and any other applicable theory of liability,” and “if applicable, RCW 7.72 et seq.” Dkt. 1, ¶ 34. Mrs. Yaw’s complaint does not specify whether her claims are pursuant to Washington law only, or also pursuant to maritime law. Both appear applicable to her claims. *See* Dkt. 95 at 9. In maritime tort cases, as distinct from state-law tort cases, federal courts “act as common-law court[s], subject to any controlling statutes enacted by Congress.” *Air & Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 994 (2019) (“*DeVries*”) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507–08 (2008)). The Supreme Court’s recent decision in *DeVries* announced a new legal standard for the duty to warn in maritime torts. *DeVries*, 139 S. Ct. at 991. This decision was announced on March 19, 2019, after the parties had submitted the briefing on the motions for summary judgment at issue. As will be discussed in more detail below, the Court will require supplemental briefing addressing this new precedent.

##### A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,  
2 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
3 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
4 present specific, significant probative evidence, not simply “some metaphysical doubt”).  
5 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists  
6 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
7 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
8 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
9 626, 630 (9th Cir. 1987).

10       The determination of the existence of a material fact is often a close question. The  
11 Court must consider the substantive evidentiary burden that the nonmoving party must  
12 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
13 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
14 issues of controversy in favor of the nonmoving party only when the facts specifically  
15 attested by that party contradict facts specifically attested by the moving party. The  
16 nonmoving party may not merely state that it will discredit the moving party’s evidence  
17 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
18 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
19 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
20 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

1 **B. Timeliness of the Motion**

2 Before addressing the topics for supplemental briefing, the Court will address Mrs.  
3 Yaw's Fed. R. Civ. P. 56(d) request to defer consideration of summary judgment, raised  
4 in response to Defendants' motion for summary judgment. Mrs. Yaw asserts that "the  
5 record in this case is not complete" because her expert witnesses have not yet submitted  
6 their reports, and because discovery is ongoing until May 13, 2019, the Court should  
7 defer consideration of Defendants' motion. Dkt. 106 at 2.

8 Fed. R. Civ. P. 56(d) provides that "[i]f a nonmovant shows by affidavit or  
9 declaration that, for specified reasons, it cannot present facts essential to justify its  
10 opposition" to summary judgment, the reviewing court may deny the motion, defer  
11 consideration, allow time for the nonmovant to obtain affidavits, declarations, or  
12 discovery, or "issue any other appropriate order." A party opposing summary judgment in  
13 these circumstances "must make '(a) a timely application which (b) specifically identifies  
14 (c) relevant information, (d) where there is some basis for believing that the information  
15 sought actually exists.'" *Emp'r Teamsters Local Nos. 175 & 505 Pension Trust Fund v.*  
16 *Clorox Co.*, 353 F.3d 1124, 1129 (9th Cir. 2004) (quoting *VISA Int'l Serv. Ass'n v.*  
17 *Bankcard Holders of Am.*, 784 F.3d 1472, 1475 (9th Cir. 1986)).

18 Mrs. Yaw explains that she expects one of her experts to provide "important  
19 evidence regarding Defendants' equipment that was aboard the ships being overhauled at  
20 PSNS when Mr. Yaw was working on those ships as a shipfitter," as well as information  
21 about Defendants' insulation and asbestos-containing materials practices. Dkt. 106 (citing  
22 Dkt. 107, ¶ 46, Declaration of Plaintiffs' Counsel Benjamin H. Adams). She also explains

1 that another of her experts will provide “exposure and causation evidence,” and explains  
2 that she “is still discovering” information from Defendants about the equipment aboard  
3 the particular ships and Defendants’ contracts with and specifications from the Navy. *Id.*

4 Defendants counter that the Declaration from Plaintiffs’ Counsel, Dkt. 107, ¶ 46,  
5 makes only conclusory statements about the ongoing records and corporate representative  
6 discovery, and does not explain what the information sought would be expected to show  
7 or how it would preclude summary judgment. Dkt. 111 at 11. Defendants also argue that  
8 Mrs. Yaw’s experts would have had to submit affidavits to be considered at summary  
9 judgment, and Mrs. Yaw has not argued her experts were unavailable to provide  
10 affidavits. *Id.* at 12.

11 It is a close question whether Mrs. Yaw has met her burden to explain specifically  
12 how the discoverable information she seeks could preclude summary judgement.  
13 However, the Court finds that additional briefing is required to resolve the motion for  
14 summary judgment, as discussed below. In the interests of judicial efficiency, the Court  
15 will allow a Rule 56(d) continuance of the motion until the dates set for supplemental  
16 briefing. That is, Mrs. Yaw may present both her analysis of the topics for supplemental  
17 briefing, and any additional facts discovered, in her supplemental briefing.<sup>3</sup>

### 18 **C. Merits of Summary Judgment**

19 Defendants’ motion argues that (1) there is no evidence that Mr. Yaw was exposed  
20 to asbestos from a product Defendants manufactured; (2) Defendants did not manufacture  
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22 <sup>3</sup> If another Rule 56(d) request is necessary, Mrs. Yaw may submit it at that time.

1 the insulation or other asbestos products used in conjunction with their equipment; and  
2 (3) Mrs. Yaw “cannot establish that the lack of adequate warnings or instructions  
3 proximately caused Mr. Yaw’s injuries.” Dkt. 95 at 1–2.

#### 4 **1. Maritime Law**

5 In *DeVries*, the Supreme Court considered the scope of a manufacturer’s duty to  
6 warn in the context of maritime tort law. 139 S. Ct. at 991. The manufacturers, which  
7 included GE, Foster Wheeler, and Westinghouse, had produced pumps, blowers, and  
8 turbines for Navy ships, which in the Court’s description, “required asbestos insulation or  
9 asbestos parts in order to function as intended.” *Id.* The Supreme Court rejected “the  
10 more defendant-friendly bare metal defense” which provided that “[i]f a manufacturer did  
11 not itself make, sell, or distribute the part or incorporate the part into the product, the  
12 manufacturer is not liable for harm caused by the integrated product . . . .” *Id.* at 994  
13 (citing *Lindstrom v. A-C product Liability Trust*, 424 F.3d 488, 492 (6th Cir. 2005)). On  
14 the other hand, the Supreme Court found that “foreseeability that the product may be  
15 used with another product or part that is likely to be dangerous is not enough to trigger a  
16 duty to warn. But a manufacturer does have a duty to warn when its product *requires*  
17 incorporation of a part and the manufacturer knows or has reason to know that the  
18 integrated product is likely to be dangerous for its intended uses.” *DeVries*, 139 S. Ct. at  
19 993–94. The standard the Supreme Court announced finds a product manufacturer has a  
20 duty to warn “when (i) its product requires incorporation of a part, (ii) the manufacturer  
21 knows or has reason to know that the integrated product is likely to be dangerous for its  
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1 intended uses, and (iii) the manufacturer has no reason to believe that the product's users  
2 will realize that danger." *Id.* at 996.

3 While Defendants made a strong showing on a lack of proximate causation based  
4 on a failure to warn, that briefing was submitted prior to *DeVries*. In supplemental  
5 briefing, the Court expects the parties to address topics including how *DeVries* may  
6 impact causation and the failure-to-warn analysis in this case, and how the products at  
7 issue in *DeVries* were similar to or different from the products at issue in this case.<sup>4</sup>

## 8 **2. Washington Law**

9 As noted, the Court has elected to delay its consideration of summary judgment  
10 until supplemental briefing is submitted.

11 The Court expects that Mrs. Yaw will submit a comprehensive substantive  
12 response to the supplemental briefing as ordered below, covering both maritime law and  
13 Washington law issues. This will allow the Court to address the motion for summary  
14 judgment on the merits at that time.

## 15 **V. ORDER**

16 Therefore, it is hereby **ORDERED** that Plaintiffs' motion for leave to amend, Dkt.  
17 140, is **GRANTED**.

18 The Court will reserve ruling on Defendants' motion for summary judgment. The  
19 Clerk shall renote the motion, Dkt. 95, for consideration on the Court's May 24, 2019  
20 calendar. Defendants may submit supplemental briefing by May 2, 2019, and Mrs. Yaw

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22 <sup>4</sup> The Court will address Defendants' motion to strike inadmissible evidence submitted as part of  
its reply, Dkt. 111, as part of the Court's comprehensive treatment of this motion if it remains relevant.

1 may submit a comprehensive, substantive response no later than May 20, 2019. The reply  
2 brief is due on the noting date per the Local Rules. W.D. Wash. LCR 7(d).

3 Dated this 18th day of April, 2019.

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6 BENJAMIN H. SETTLE  
7 United States District Judge  
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